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No. 91-804

SUPREME COURT, U.S.
FILED

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In The
Supreme Court of the United States
January Term, 1992

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DAVID MOGAN,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

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On Petition For A Writ Of Certiorari
To The Supreme Court of Montana

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**BRIEF IN OPPOSITION TO PETITION
FOR CERTIORARI**
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January 1992

QUESTION PRESENTED

Whether this Court has certiorari jurisdiction to review orders of the Montana Supreme Court dismissing an appeal for failure of the petitioner to timely transmit the record.

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STATEMENT OF THE CASE

The petitioner, David Mogan, was found guilty of the offense of violation of speed restrictions, Mont. Code Ann. § 61-8-303 (1989), following a jury trial held October 1, 1990, in the district court of Musselshell County. A sentencing hearing was held October 15, 1990, and Mogan was sentenced to five days in the county jail and fined \$50. Additionally Mogan was ordered to pay the clerk of the district court \$864.17 to reimburse Musselshell County for the cost of his court-appointed attorney. Imposition of the sentence was stayed provided Mogan exercised his appeal rights.

A notice of appeal was filed by Mogan on October 18, 1990. The petitioner filed no motion with the Montana Supreme Court to extend the 40-day period in which to submit the district court record. The district court record was submitted to the Clerk of the Montana Supreme Court on January 16, 1991. The Musselshell County Attorney served Mogan on January 23, 1991, with a notice of respondent's intent to file a motion to dismiss the appeal pursuant to Mont. R. App. P. 11(c). Such notice was received by Mogan on February 8, 1991, as reflected by an affidavit and supporting domestic return receipt, prepared by the county attorney on April 12, 1991. The clerk of the district court executed, on April 12, 1991, a certificate showing the date and substance of the judgment from which the appeal was taken, the date on which the notice of appeal was filed, and the fact that no order granting an extension of time in which to transmit the record was filed.

In reliance upon the Montana Rules of Appellate Procedure and the above-referenced documents, the Montana Attorney General filed a motion to dismiss Mogan's appeal on April 19, 1991. The State's motion to

dismiss the appeal was granted by the Montana Supreme Court on June 6, 1991. (Pet. App. A.) On June 19, 1991, Mogan filed a petition for rehearing pursuant to Mont. R. App. P. 34. This petition was denied in an order of the Montana Supreme Court dated June 25, 1991. (Pet. App. B.)



SUMMARY OF ARGUMENT

This Court should deny the petition for writ of certiorari because the Montana Supreme Court's orders dismissing petitioner's appeal present no federal question over which jurisdiction exists under 28 U.S.C. § 1257(a).



ARGUMENT

The petitioner attempts to invoke this Court's certiorari jurisdiction to review the Montana Supreme Court's application of its rules of appellate procedure. Additionally, petitioner seeks review of a state district court proceeding in which he was sentenced. This Court is without certiorari jurisdiction to review a Montana district court decision as these courts are not "the highest court of a state in which a decision could be had." 28 U.S.C. § 1257(a).

This Court does not have a general supervisory power over state courts. In reviewing a state court judgment, the Court is confined to evaluating that judgment's correctness with reference to the federal Constitution or federal laws. Chandler v. Florida, 449 U.S. 560, 570 (1981). The Montana Supreme Court orders at issue here simply determined, pursuant to the Montana Rules of Appellate

Procedure, that Mogan's appeal should be dismissed as he failed to timely transmit the record of the underlying prosecution. The Montana Supreme Court interpreted no federal constitutional right or federal law. This Court has no certiorari jurisdiction under 28 U.S.C. § 1257(a) to review such orders that are based wholly on state law. International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 387 (1986). Despite the petitioner's vague references to federal constitutional rights, the petition actually raises no federal question of law.

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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